STATE OF MICHIGAN

IN THE SUPREME COURT

On Appeal from the Court of Appeals
Patrick M. Meter, PJ, Mark J. Cavanagh & Jessica R. Cooper, JJ

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

-vs-

MSC No. **123992**
COA No. **237794**
L.C. No. **00-13258**

DENNIS L. NICKENS,
Defendant-Appellee.

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DEFENDANT-APPELLEE'S BRIEF ON APPEAL

*** * *ORAL ARGUMENT REQUESTED* * ***

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STATEMENT OF JURISDICTION

Defendant-Appellee was originally charged with first degree criminal sexual involving force or coercion and injury. The trial judge, over defense counsel's objection, instructed Defendant's jury on the offense of assault with intent to commit criminal sexual conduct involving penetration and the jury convicted him on that charge on July 19, 2001. A Judgment of Sentence was entered by the lower court on August 23, 2001.

A claim of appeal was filed by the lower court pursuant to this indigent Defendant's request for the appointment of appellate counsel, in accordance with MCR 6.425(F)(3). The Michigan Court of Appeals had jurisdiction over Defendant's appeal as of right as provided for by the Michigan Constitution of 1963, Article 1, Section 20 and in accordance with MCL 600.308(1), MCL 770.3, MCR 7.203(A), and MCR 7.204(A)(2).

This Honorable Court has jurisdiction as provided by MCR 7.301(A()2).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. ARE THE ELEMENTS OF ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT INVOLVING PENETRATION A SUBSET OF THE ELEMENTS OF THE OFFENSE OF FIRST DEGREE CRIMINAL SEXUAL CONDUCT INVOLVING FORCE OR COERCION AND PERSONAL INJURY AND SHOULD, THEREFORE, AN INSTRUCTION ON SAME BE GIVEN TO A JURY?

THE LOWER COURT ANSWERED "YES".
PLAINTIFF-APPELLANT ANSWERS "YES".
DEFENDANT-APPELLEE ANSWERS "NO".

II: REGARDLESS OF WHETHER THE ELEMENTS OF ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT INVOLVING PENETRATION ARE A SUBSET OF THE CHARGED OFFENSE IN THIS CASE AND REGARDLESS OF WHETHER PEOPLE V CORNELL SHOULD BE APPLIED RETROACTIVELY, WAS DEFENDANT HEREIN DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO NOTICE OF THE CHARGE AGAINST HIM AND THE OPPORTUNITY TO DEFEND AGAINST THAT CHARGE AND, IF SO, WAS SUCH DENIAL HARMLESS?

THE LOWER COURT ANSWERED "YES".
PLAINTIFF-APPELLANT ANSWERS "YES".
DEFENDANT-APPELLEE ANSWERS "NO".

COUNTER-STATEMENT OF FACTS

Defendant-Appellee, DENNIS L. NICKENS, does not dispute Plaintiff-Appellant's statement of facts.

I. THE ELEMENTS OF ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT INVOLVING PENETRATION ARE NOT A SUBSET OF THE ELEMENTS OF THE OFFENSE OF FIRST DEGREE CRIMINAL SEXUAL CONDUCT INVOLVING FORCE OR COERCION AND PERSONAL INJURY AND AN INSTRUCTION ON SAME SHOULD NOT, THEREFORE, BE GIVEN TO A JURY.

> **STANDARD OF REVIEW:** Appellee agrees that de novo is the standard of review in cases such as this. **People** v **Carpentier**, 446 Mich 19 (1994); See also **People** v **Hubbard**, on remand, 217 Mich App 459 (1996); **Seals** v **Henry Ford Hospital**, 123 Mich App 329 (1983).

Defendant was originally charged with first degree criminal sexual conduct (hereafter referred to CSC) causing personal injury and involving force or coercion, in violation of MCL 750.520b(1)(f). A jury was instructed on and found him guilty of assault with intent to commit CSC involving penetration, in violation of MCL 750.520g(1).

The Michigan Court of Appeals reversed Defendant's conviction finding that **People** v **Cornell**, 466 Mich 335 (2002), controlled and the elements of assault with intent to CSC are not a subset of the elements of first degree CSC and, as such, it is not a cognate lesser offense of first degree CSC. In **Cornell**, this Court determined that MCL 768.32 permits a trial court to instruct only on necessarily lesser included offenses and not on cognate lesser offenses.

Plaintiff-Appellant incorrectly argues that the Court of Appeals erred in its reasoning that assault with intent to commit CSC involving penetration requires proof of an improper sexual purpose. A line of Michigan decisions have found that indeed one of the necessary elements of assault with intent to commit CSC is "an improper sexual purpose or intent". **People** v **Evans**, 173 Mich App 631 (1988); **People** v **Draper**, 150 Mich App 481 (1986), on remand (188 Mich App 77 (1991); **People** v **Snell**, 118 Mich App 750 (1982); **People** v **Love**, 91 Mich App 502 (1979).

Another of the elements of assault with intent to commit CSC is an intent

to commit an act involving penetration. Assault with intent to commit CSC thus requires evidence of a specific intent. **People** v **Swinford**, 150 Mich App 507 (1986); **People** v **Sabin**, (on remand), 463 Mich 43 (2000), whereas first degree CSC does not require evidence of a specific intent. Unlike the charge of first degree CSC, which requires evidence of penetration, to support a conviction for assault with intent to commit CSC it is not necessary to show that the sexual act was started or completed. **People** v **Snell**, Supra.

The distinction between a necessarily included lesser offense and a cognate lesser offense is with a necessarily included lesser offense it would be impossible to commit the greater offense without first committing the lesser, while a cognate lesser offense only has some of the same elements of the greater offense. **People** v **Bearss**, 463 Mich 623 (2001); **People** v **Veling**, 443 Mich 23 (1993).

Under the **Snell** decision, assault with intent to commit CSC is a cognate lesser offense of first degree CSC. See also **People** v **White**, 139 Mich App 484 (1984). The Michigan Court of Appeals reversed Defendant's conviction based on this Court's decision in **Cornell** that jury instructions on cognate lesser offenses are not allowed and that the holding applies to all cases pending at the time of its decision.

Defendant argues that, based on the foregoing, it was error for the trial court to give an instruction on assault with intent to commit CSC involving sexual penetration when the original charge was first degree CSC involving personal injury and the use of force or coercion.

II: REGARDLESS OF WHETHER THE ELEMENTS OF ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT INVOLVING PENETRATION ARE A SUBSET OF THE CHARGED OFFENSE IN THIS CASE AND REGARDLESS OF WHETHER PEOPLE v CORNELL SHOULD BE APPLIED RETROACTIVELY, DEFENDANT HEREIN WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO NOTICE OF THE CHARGE AGAINST HIM AND THE OPPORTUNITY TO DEFEND AGAINST THAT CHARGE AND SUCH DENIAL IS NOT HARMLESS.

> **STANDARD OR REVIEW:** This Court reviews issues of the violations of constitutional rights to notice and opportunity to defend against charges on a de novo basis. **People** v **Sierb**, 456 Mich 519 (1998).

While Plaintiff-Appellant has included a lengthy discussion on the retroactivity of this Court's holding in **Cornell** in its brief, Defendant-Appellee only states that this Court specifically stated in its holding in **Cornell** that said holding was "to be given limited retroactive effect, applying to those cases pending on appeal in which the issue has been raised and preserved." **Cornell**, Supra at 367.

Defendant's case was indeed pending on appeal when **Cornell** was decided and Plaintiff-Appellant does not claim that the issue involved herein was not preserved for review. (See footnote 1 on Page 3 of Plaintiff-Appellant's Brief on Appeal).

The United States and Michigan Constitutions guarantee a defendant the right to be notified of the nature of any charges against him or her. This ia an essential element of due process. US Const, Ams VI, XIV; Mich Const 1963, Art 1, §§17, 20.

The Sixth Amendment to the United States Constitutions guarantees citizens a right to be informed of any and all charges so that a defense can be prepared and offered. **Sheppard** v **Rees**, 909 F2d 1234 (CA 9, 1990). The Fourteenth Amendment incorporates this notice provision and applies it to the states. **Gray** v **Raines**, 662 F2d 569 (CA 9, 1981).

The right to reasonable notice of charges against a defendant and the

opportunity to defend against charges are basic rights in our legal system. **People** v **Darden**, 230 Mich App 597 (1998). The United States Supreme Court has held that convicting a citizen of a crime not charged is a violation of the due process clause. **Cole** v **Arkansas**, 333 US 196; 68 SCt 514; 92 LEd 644 (1948).

In **Schmuck** v **United States**, 49 US 705, 717; 109 SCt 1443; 103 LEd2d 734 (1989), the Court rejected the fact-based, inherent relationship analysis previously used by some federal circuit courts in determining what constitutes a lesser included offense and adopted a traditional elements test. In the elements test only instructions on lesser offenses that contain the same elements as the charged offense are allowed because this then gives notice to a defendant that he or she may be convicted of either charge.

Defendant argues that it was error for the trial court to instruct the jury on the offense of assault with intent to commit CSC because it is not a necessarily lesser included offense of first degree CSC and that said error was not harmless because it violated his federal and state constitutional rights to notice and due process.

Defendant also asserts that the Court of Appeals' finding that the error committed by the trial court in his case was not harmless because he was in fact acquitted of the charged offense and convicted of the assault with intent to commit CSC.

Defendant-Appellee urges this Honorable Court to reject the arguments proffered by Plaintiff-Appellant and uphold the decision of the Court of Appeals in his case.

RELIEF REQUESTED

WHEREFORE, for all of the foregoing reasons, Defendant-App DENNIS L. NICKENS, respectfully requests that this Honorable Court affirm the ruling of the Court of Appeals.

Respectfully submitted,

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